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No. 21

In the Supreme Court of the United States

OCTOBER TERM, 1955

UNITED STATES OF AMERICA, PETITIONER

v.

TWIN CITY POWER COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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I

CONSTRUCTION OF THE CLARK HILL PROJECT WAS A PROPER EXERCISE OF THE FEDERAL NAVIGATION POWER

A. *The Congressional Declaration*:—

Respondent vigorously urges that the Clark Hill project was not undertaken in exercise of the federal navigation power and that Congress, indeed, indicated "a contrary intent" (Resp. Br., p. 37). In support of this contention, respondent states (*id.*, p. 36): "The Act of 1944 does not mention navigation in its title. The section authorizing Clark Hill refers to the 'Savannah River Basin.' It makes no use of the word 'navigation.'" Curiously, respondent also relies (*id.*, p. 37) on the opening paragraph of Section 1 of the Flood Con-

trol Act of 1944, which declares the policy of Congress as follows:

> . . . it is hereby declared to be the policy of the Congress . . . to limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized therefrom and which can be operated consistently with appropriate and economic use of the waters of such rivers by other users.

The argument is that the instant project is in fact without substantial benefit to navigation (a contention which we discuss under B, *infra*), and that this therefore must be a case in which Congress (notwithstanding its declaration in Section 1) did not propose to exercise the federal navigation servitude. A plainer misreading of the enabling statute would be difficult to imagine.

Congress, quite true, declared in unmistakable terms, in the opening paragraph of the Act, its intention to limit its authorization of projects to those "in which a substantial benefit to navigation will be realized. . . ." In a subsequent section (Section 10, Opening Govt. Br., pp. 3-4) it authorized various projects which it determined to be consistent with this purpose. Among the projects which it so authorized was the Clark Hill project. If, as respondent affects to believe (Br., pp. 36-37), Congress did not intend Clark Hill to be regarded as a navigation improvement, respondent must also believe that Congress mistakenly authorized the project. For the fact is that, in determining (a)

that it would only authorize projects which would result in "substantial benefit to navigation" and (b) that it would authorize Clark Hill, Congress plainly and necessarily determined that Clark Hill met that test.

Respondent also attaches significance to the fact that the 1944 Act was called the Flood Control Act of 1944 and failed to incorporate the word "navigation" in the title. To begin with, keeping a river within its banks and thus avoiding impairment of navigation and transportation (as well as injury to persons, loss of life, and damage to various forms of property) is one of the most compelling reasons for exercise of the navigation power. If there was any doubt that this power comprehended the achievement of flood-control objectives on navigable streams, it was certainly laid to rest by the decision (unanimous on this point) in *United States v. Appalachian Power Co.*, 311 U.S. 377, 426.

It is also plain, however, that the use of the short title "Flood Control Act" does not imply that projects authorized by the Act lack a specific waterway improvement purpose. Section 1 (Opening Govt. Br., p. 2) declares that the Act undertakes to authorize "the construction of works of improvement, for navigation or flood control. . . ." And Section 2 expressly defines "flood control" as including "channel and major drainage improvements."[1]

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[1] Section 2, which was not set forth in our opening brief, reads as follows:

That the words "flood control" as used in section 1 of the Act of June 22, 1936, shall be construed to include

The specific projects approved by Congress are listed in Section 10. This section begins with the declaration that "the following works of improvement for the benefit of navigation and the control of destructive flood waters and other purposes are hereby adopted and authorized. . . ." (Opening Govt. Br., p. 3). There follows a list of more than thirty river-basin developments, with appropriate authorizations for particular projects. One of the subparagraphs of the section approves the general plan for a comprehensive development of the Savannah River Basin and authorizes construction of the Clark Hill project as a means to that end. Respondent argues that it is significant that Congress failed to use the word "navigation" in the subparagraph referring to the Savannah River Basin development. The precise language used by Congress is as follows:

> The general plan for the comprehensive development of the Savannah River Basin for flood control and other purposes recommended

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channel and major drainage improvements, and that hereafter Federal investigations and improvements of rivers and other waterways for flood control and allied purposes shall be under the jurisdiction of and shall be prosecuted by the War Department under the direction of the Secretary of War and supervision of the Chief of Engineers, and Federal investigations of watersheds and measures for run-off and water-flow retardation and soil-erosion prevention on watersheds shall be under the jurisdiction of and shall be prosecuted by the Department of Agriculture under the direction of the Secretary of Agriculture, except as otherwise provided by Act of Congress.

> by the Chief of Engineers in House Document Numbered 657, Seventy-eighth Congress, second session, is approved and the construction of the Clark Hill Reservoir on the Savannah River in South Carolina and Georgia, is hereby authorized substantially in accordance with the recommendations of the Chief of Engineers in that report at an estimated cost of $35,300,000.

As pointed out above, Section 2 defines flood control to include channel improvement. Moreover, as indicated in the Government's opening brief (pp. 4-5), reference to the report of the Chief of Engineers shows that the "other purposes" included, specifically, navigation improvement as well as water-power development.

It is also to be observed that Congress did not use the specific word "navigation" in describing the other thirty-odd river-basin developments which it approved in Section 10 (see 58 Stat. 892-903). Is it also respondent's view that the projects authorized in the Upper Mississippi Basin, the Ohio River Basin, the Susquehanna River Basin, the Connecticut River Basin, and the Roanoke River Basin (to name a few of the projects approved) had no navigation purpose?

The fact is that this Court has already considered the purposes of the Flood Control Act of 1944 in a case involving the Roanoke River Basin, *Chapman* v. *Federal Power Commission*, 345 U. S. 153. The Roanoke development was approved in the same section (Sec. 10) as that which authorized the

Savannah River development and the Congressional purpose was declared in the identical words —"for flood control and other purposes" (58 Stat. 894). Reviewing the history of the Flood Control Act of 1944 and the predecessor Flood Control Act of 1936,[2] the Court concluded that Congress manifestly intended to authorize only those power projects having "flood-control or navigational benefits" (345 U. S. at 170).

In sum, it appears that the program initiated by the Flood Control Act of 1936 and carried forward by the 1944 Act reflected a decision that the Federal Government, in circumstances when certain broad

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[2] As observed in *Chapman* (pp. 157-158), the policy of the 1936 Act was as follows (Sec. 1, 49 Stat. 1570):

> It is hereby recognized that destructive floods upon the rivers of the United States, upsetting orderly processes and causing loss of life and property, including the erosion of lands, and impairing and obstructing navigation, highways, railroads, and other channels of commerce between the States, constitute a menace to national welfare; that it is the sense of Congress that flood control on navigable waters or their tributaries is a proper activity of the Federal Government in cooperation with States, their political subdivisions, and localities thereof; that investigations and improvements of rivers and other waterways, including watersheds thereof, for flood-control purposes are in the interest of the general welfare; that the Federal Government should improve or participate in the improvement of navigable waters or their tributaries, including watersheds thereof, for flood-control purposes if the benefits to whomsoever they may accrue are in excess of the estimated costs, and if the lives and social security of people are otherwise adversely affected.

Surveys of both the Savannah and the Roanoke River Basins were authorized by this statute. 49 Stat. 1593, 1596.

public interests were affected, would assume the responsibility to "improve or participate in the improvement of navigable waters" (1936 Act, Sec. 1, note 2, *supra*); that Congress was interested in making hydroelectric power a paying partner in order to make economically feasible projects which would serve flood-control and navigation purposes, but was determined, at the same time, to authorize only those projects which would yield substantial flood-control and navigation benefits (1944 Act, Sec. 1; *Chapman* v. *Federal Power Commission*, *supra*); that the 1944 Act was passed "in the exercise of jurisdiction over the rivers of the Nation" (Sec. 1); and that the plans and works specifically approved and authorized by that Act (including the Clark Hill project) were explicitly declared by Congress to be "for the benefit of navigation and the control of destructive flood waters and other purposes" (Sec. 10). To say, in the face of these declarations and determinations, that there was no clear or express intention to invoke the navigation powers of the United States (Resp. Br., pp. 36-37) is simply to ignore the facts.[2a]

Contrary to respondent's suggestion (Br., pp. 38-40), there is nothing in *United States* v. *Gerlach Livestock Co.*, 339 U. S. 725, or in *Federal*

[2a] Congress, it may be noted, knew how to place limits upon the exercise of the navigation power when it desired to do so. In connection with approved projects in the western states, it provided that use of the waters for navigation purposes shall only be such as does not conflict with certain described state-created rights of beneficial use. Flood Control Act of 1944, Section 2(b).

Power Comm'n v. *Niagara Mohawk Power Corp.*, 347 U. S. 239, which would warrant the conclusion that, in the instant situation, Congress failed to invoke or rely upon the navigation servitude.

In *Gerlach*, the question was whether Congress intended to provide compensation for the loss of riparian rights, valid under state law, resulting from construction of the Friant Dam, and its dependent irrigation system, as part of the Central Valley project.[3] The Court concluded that, while certain navigation purposes were served by the Central Valley project as a whole, Congress did not intend "to invoke its navigation servitude as to each and every one" of the component projects (p. 737). It found, on the contrary, that both administrative practice and Congressional action showed a consistent design to treat the Friant Dam construction as a reclamation project and to make the provisions of the Reclamation Act applicable thereto. Under that Act, the Court held, Congress "elected" to provide compensation for riparian rights of the type involved (p. 739).

In *Niagara Mohawk*, it appeared that the respondent, a private utility company licensed under the Federal Power Act, had paid substantial sums to acquire outstanding usufructuary water rights long recognized under New York law.[4] The issue

[3] The rights asserted were to use of water for agricultural purposes.

[4] Since 1861, respondent's predecessors in interest had diverted water above Niagara Falls, by means of an intake canal, and returned it to the Niagara River below the falls. This use did not involve obstruction of the stream and it created no conflict with federal law.

was whether under Section 10(d) of the Power Act respondent might take those payments into account for purposes of determining its surplus earnings and the extent of its amortization reserve liability.[5] From its examination of various provisions of the Power Act, the Court concluded that the statute did not purport to interfere with a licensee's obligations under state law to persons possessing water rights validly established under state law. And it held that respondent's payments constituted a legitimate expense which reduced its surplus earnings and its reserve liability.[6]

The conclusion that the regulatory scheme of the Federal Power Act does not manifest an intention to exercise the navigation servitude to the extent of eliminating the duty of a licensee to compensate third parties for established state-created water rights adversely affected by the licensee's activities is not one which aids the respondent here. The statute here involved is not one establishing a

[5] Under the scheme of the Act, the amortization reserve reduces the amount of net investment which the United States must pay the licensee in the event that the Government exercises its statutory right of recapture.

[6] This holding was by four Justices of the Court. The three dissenting Justices agreed that the Power Act did not interfere with the licensee's obligations under state law; but they were of the view that the United States was not to be placed in the position where it might have to pay indirectly for rights within the scope of the navigation servitude. It was their position that "[i]f Niagara must pay for its water rights without being reimbursed by the United States, that is the price which Niagara must pay for its federal license." (dissenting opinion of Mr. Justice Douglas, p. 259).

licensing or regulatory scheme. Here, the United States, acting in its sovereign capacity and exercising its paramount authority, has undertaken a public project. It has done so in strict reliance upon its power to regulate navigable streams for flood-control and navigation purposes. There is no room for an inference that it has not invoked, in full measure, the navigation servitude.

We point out additionally the marked difference between the nature of the water rights acquired by Niagara Mohawk and the character of Twin City's claim. The water rights involved in the *Niagara Mohawk* case were established usufructuary interests which had been exercised for the better part of a century. This exercise had entailed no conflict with federal law since the water was withdrawn without obstruction of the river and was returned undiminished in quantity. See note. 4, *supra*. Here, respondent's claim rests upon the fact that its land was suitably located for throwing a dam across the Savannah River (which the United States has now done, though it has done it elsewhere). Far from having a vested right to build a dam in a navigable river, respondent would have committed an offense had it done so in the absence of express federal authorization. That has been true since 1899, a date prior to the time when respondent was chartered and prior to its acquisition of any of the lands involved. Rivers and Harbors Act of 1899, Sections 9, 12, 30 Stat. 1151, 33 U. S. C. 401, 406.

B. *Facts Supporting the Congressional Determination:*—

The Army's Chief of Engineers, substantially concurring in the views of the District Engineer and the Board of Engineers, recommended the Savannah River improvements "for power development, flood control, navigation, and other purposes," H. Doc. 657, 78th Cong., 2d Sess., p. 6.[7] The Federal Power Commission, after "careful study," agreed that the development would be "very desirable" for "flood control, power, navigation, and other beneficial purposes" (*id.*, p. 7.) The legislatures of South Carolina and Georgia and many civic bodies in those states endorsed construction of a public project at Clark Hill (*id.*, p. 31). Thus, a concurrent resolution of the South Carolina legislature urged the President of the United States to support the project in the interests of "improving navigation, establishing flood control, and developing hydroelectric power" (*ibid.*). The mayor of Augusta, Georgia, pressed for construction "by the Federal Government (1) to make available for navigation for 100 per cent of the time a channel depth of 6 feet between Savannah and Augusta and also to increase this depth for the same percentage of the time to 7 feet; (2) to furnish a certain amount of flood

[7] Respondent comments (Br., p. 18) that the letter of the Secretary of War, dated June 6, 1944 (H. Doc. 657, *supra*, p. VII), did not refer to navigation. The Secretary's brief letter of transmittal expressed no opinion concerning the project except that, if approved, construction should be deferred until after the war.

control for the valley below the dam; and (3) to make available for a considerable area of the Southeast a large block of hydroelectric power for rural electrification and industrial purposes" (*ibid.*). Congress, as observed above, approved the project by an Act which expressly declared that Congressional approval was being confined to projects which had substantial flood-control and navigation purposes. Nonetheless, respondent now advises this Court (Br., p. 36) that "Congress very honestly has made no pretense that this was intended as a navigation improvement. It authorizes Clark Hill as a hydro-electric development. . . ." And respondent proceeds, on various grounds, to ask the Court to hold that there is no rational basis for a finding that flood-control and navigation purposes will be served.

Respondent emphasizes (Br., p. 17) that over 95% of the estimated cost of building Clark Hill (approximately $35,000,000) was allocated to power and the remainder to navigation and flood control. It also points out (*ibid.*) that the annual benefits were estimated at more than $7,000,000 from power and approximately $300,000 from improvement in navigation and flood control. On the face of it, this Court could not treat annual benefits estimated at $300,000 as insubstantial.

In addition, however, the figures, standing alone, are deceptive. Certain navigation benefits described as "considerable" were not taken into account in allocating costs because their value was not susceptible of dollar measurement. H. Doc. 657, *supra*, pp. 65-66. The plans for flood control (*id.*,

pp. 35-36, 38) show that the computation of benefits (and likewise the allocation of costs) was made on the basis of annual average property damage caused by floods in those areas which would receive newly provided protection as a result of the project. For obvious practical reasons, no effort was made to estimate the consequential damages which may be caused by a flood disruptive of an area's economy; to compute the insurance value of a project which guards against the danger that abnormal conditions of weather will cause havoc in an area already vulnerable to floods under ordinary conditions; to assay in dollars the threat to health and life represented by floods. These were not unimpressive considerations in a valley inundated on 83 separate occasions between 1923 and 1942 (*id.*, p. 2).[8]

It is, of course, true that the development of water power plays a vital role in the Clark Hill project (as it does in most multipurpose river-basin projects). Clearly, the Government would not have undertaken the very costly construction of a 130-foot dam and attendant works for the sole purpose of pursuing navigation and flood-control objectives—objectives which were susceptible of achievement by works of lesser scale (*id.*, p. 36). The decision to make the heavy investment required for a project which would also yield hydroelectric energy reflected two major considerations: (1) that there

[8] Augusta, Georgia, experienced 133 flood peaks in the same period. A levee, completed in 1941, gave that city a considerable measure of protection. The added protection which the city will receive from the Clark Hill Dam was not taken into account in assigning flood-control benefits to the Clark Hill project. *Id.*, pp. 35-36.

was need for additional electric energy in the area: (2) that combining navigation improvement and flood control with power yield made economical a project which otherwise would not have been feasible (see *id.*, pp. 2-3). In short, the substantial expenditure required to obtain a power yield—an expenditure which was necessary to put the project on a paying basis—does not detract from the fact that the flood-control and navigation benefits are substantial, that they are more important than the cost allocations reflect, and that they constituted a *sine qua non* of Congressional approval. In *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508, the State of Oklahoma challenged the authority of Congress to combine flood-control and power purposes in a manner which resulted in the taking of more state lands than would have been required for flood-control purposes alone. This Court unanimously held, "It is sufficient for us that Congress has exercised its commerce power, though other purposes will also be served" (p. 528).[9]

In its "Statement of the Facts" (Br. pp. 17-18), respondent advances the argument that the proposed method of operating Clark Hill Dam (25% primary load-factor operation) was not one calcu-

[9] At another point in its opinion, the Court stated (pp. 533-534):

> Whether the work of flood-control, including river flow, would be better done by a dam of one design or another is for Congress to determine. And, as we have said, the fact that ends other than flood control will also be served, or that flood control may be relatively of lesser importance, does not invalidate the exercise of the authority conferred on Congress.

lated to assure continuous increased minimum channel depth on the downstream portions of the river; that the "proposed solution was to compel the privately owned Stevens Creek plant" (located between Clark Hill and downstream Augusta) to provide re-regulation at a sacrifice of its hydro-electric values; and that this shows that Clark Hill was "exclusively" a power venture.

Respondent does not and cannot deny that Clark Hill Dam was to provide the increased storage which alone would make possible the contemplated navigation improvement on the downstream portions of the river. Moreover, it fails to make an adequate presentation of the facts with reference to re-regulation at Stevens Creek. As stated in the District Engineer's report (H. Doc. 657, *supra*, pp. 64-65), the proposed construction at Clark Hill would increase the prime flow available to Stevens Creek and benefit that plant to an extent which would far more than compensate for the imposition of any re-regulation functions. The Government plan was to maximize power yield at Clark Hill *and* to assure the navigation benefits described in the report. That this dual purpose was to be achieved with the cooperation of the private plant located below Clark Hill proves nothing, for the re-regulation duties to be assumed by that plant were more than outweighed by the benefits which it would receive, in the form of increased power potential, from the Government project.

It remains only to point out that the navigation benefits have been fully achieved in fact. Since the

completion of substantial portions of the work at Clark Hill in February, 1953, "the flow releases from Clark Hill have been those resulting from the operation of the project in the interest of flood control, navigation and hydroelectric power, which provides a minimum flow of 5300 cubic feet per second at the Butler Creek gage for navigation." This discharge of 5300 second-feet provides "for a channel 9 feet deep and 90 feet wide. . . ." H. Doc. 4, vol. 2, 84th Cong., 1st Sess., pp. 338-339.

Respondent also argues that the project should not be regarded as a navigation improvement in fact because "there is no claim of a navigation benefit in the stretch of the river above Augusta" (Br., p. 39). As pointed out in the Government's opening brief, there is no question of the power of the United States, acting in the exercise of its authority over navigable streams, "to block navigation at one place to foster it at another." *United States* v. *Commodore Park, Inc.*, 324 U. S. 386, 392-393. See, also, *South Carolina* v. *Georgia*, 93 U. S. 4, 10, 11; cf. *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 409-410; *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, 523.[10]

[10] The navigability of the river has been unchallenged throughout the proceeding. See R. 25, 143. Water traffic between Augusta and Savannah has been as high as 129,000 tons in a single year. Potential water traffic is over a million tons. H. Doc. 657, *supra*, pp. 61-62. Landings, wharves and terminal facilities are available. H. Doc. 4, vol. 2, *supra*, p. 339.

II.

THE SO-CALLED POWER-SITE VALUE OF RIPARIAN LANDS IS NOT RECOVERABLE FROM THE UNITED STATES WHEN THE GOVERNMENT CONDEMNS SUCH LANDS IN THE EXERCISE OF ITS CONTROL OVER NAVIGABLE STREAMS

Assuming, as we believe one must, that the United States has expressly invoked its paramount authority to control the navigable Savannah, it follows, we submit, that the riparian owner may not assert against the United States a claim of land value grounded on the assumption that such owner has a vested right to appropriate the flow of the stream. As shown in the Government's opening brief, *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, is precisely in point and controls this case. There, the claim was made that certain parcels of that company's land had special value for use as factory sites because of their proximity to the water power inherent in the adjacent stream. The Court held that the riparian owner had no right, as against the Government, "to appropriate the current to his own commercial use" (p. 76), and that the claim could not be allowed. The same is equally true here. Indeed, from the condemnee's standpoint, *Chandler-Dunbar* was a stronger case than the instant one, for the Chandler-Dunbar Company had actually built works and used the stream for the development of power for some years prior to the Government's taking (229 U. S. at 68), whereas Twin City, at the time Congress considered the proposed Government project, had,

at most, no more than a bare expectancy that it might be granted a license.[11]

Respondent argues (Br., p. 30) that there are decisions of this Court which "sustain the proposition that the adaptability of high ground adjacent to rivers for use with the water of the river must be considered if the potential is so probable as to affect market value." Respondent, however, fails to consider whether the cases which it cites are cases in which the claim was made against the United States acting in the exercise of its paramount authority over navigable waters.

Boom Co. v. *Patterson*, 98 U.S. 403, cited by respondent, involved a taking, not by the United States, but by a corporation chartered under Minnesota law to construct booms (for storage of logs)

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[11] As indicated above (p. 14), the cases make perfectly clear that it is immaterial, if there is a navigation purpose, that the Government also plans to make use of the power potential of the stream. We point out, nonetheless, that respondent has seriously erred in stating that the Government project on the St. Marys River, involved in the *Chandler-Dunbar* case, "eliminated any possibility of water power development" and that "[t]here was no mention whatever of any development of water power by the Government" (Br., p. 32). As this Court's *Chandler-Dunbar* opinion observed (pp. 72-73), the statute authorizing the St. Marys' development provided that power generated as a result of the project might be used directly by the Government or leased by the Secretary of War. Indeed, it was on this basis that the Chandler-Dunbar Company contended (p. 72) that the taking was, in part, "for commercial uses and not for the improvement of navigation." Relying on its earlier decision in *Kaukauna Co.* v. *Green Bay &c. Canal*, 142 U.S. 254, 273, this Court rejected the argument, holding that if a project is "for a recognized public purpose" the Government has full authority to dispose of any water power generated thereby (pp. 73-74).

between designated points along the Mississippi and the Rum rivers. The charter gave the company leave to apply to the state courts for condemnation of private property. Acting under this provision, the Boom Company moved to condemn land owned by respondent Patterson, which formed a line of shore along the Mississippi. The case was removed to the federal courts on diversity grounds. The issue brought to this Court was whether the adaptability of the condemned parcels for boom purposes was a proper element for consideration in fixing their value. This Court found that the use for which the lands were taken was one to which the condemnee (or buyers from him) might have put the property. Referring to Minnesota law, the Court stated (p. 408), "We do not understand that all persons, except the [condemnor], were precluded from availing themselves of these lands for the construction of a boom, either on their own account or for general use." And, so far as federal law was concerned, the Court pointed out (p. 409) that the construction of a boom along the shore was not prohibited in cases where it did not impede free navigation. Accordingly, the condemnee was held entitled to compensation for the reasonably probable use which he might have made of his land. Unlike the instant case, there was no taking by the United States; no exercise of the navigation servitude; no claim of value predicated upon a use foreclosed to the condemnee.

In *Ford & Son* v. *Little Falls Co.*, 280 U.S. 369, petitioner, a licensee under the Power Act, had en-

gaged in conduct, permitted but not required under its license, which impaired respondent's water rights, valid under state law. The holding in that case that petitioner was required to compensate respondent in no way aids Twin City here. This Court stated that respondent's rights were not "immune from . . . destruction" by the Federal Government acting in the exercise of its power to control navigation, but were, "nevertheless, an appropriate subject for legislative protection" (p. 377). And, the Court found further, the Power Act expressly required Government licensees to protect vested water rights of the type involved. By accepting the license, petitioner "agreed to recognize and protect" them (p. 379).[12]

Respondent also seeks to extract from *United States ex rel. T.V.A. v. Powelson*, 319 U.S. 266, the proposition that it is immaterial whether the United States or someone else is making the acquisition of riparian lands (see Resp. Br., pp. 27-28, 42).[13] The

[12] In *Federal Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, also cited by respondent in this connection, the Court stated (p. 254) that "the basic question" was the same as in the *Ford* case. In other words, both cases held that the Power Act affirmatively required licensees to compensate for certain types of state-created water rights, even though those rights might have been wholly subordinated to the paramount authority of the Federal Government. See discussion, *supra*, pp. 8-10.

[13] Cf. this Court's statement in *United States v. Willow River Power Co.*, 324 U.S. 499, 510:

> Whatever rights may be as between equals such as riparian owners, they are not the measure of riparian rights on a navigable stream relative to the function of the Government in improving navigation. Where these in-

case furnishes no support whatever for this conclusion. To begin with, the Court assumed in *Powelson*, for purposes of decision, that the stream involved was non-navigable. Furthermore, it found that there was no necessity to decide whether the rule of *Chandler-Dunbar* applies to the taking of riparian lands on a non-navigable stream, because it concluded that there was no reasonable probability that the condemnee might have used the property for power purposes. The Court reasoned that property which the condemnee required for such usage was in adverse hands and that the condemnee could not rest its claim of power value on its possession of eminent-domain powers conferred by North Carolina. In this connection, the Court observed that the condemnee could not have relied on those powers against the State of North Carolina, proceeding as condemnor, and that the duty of the United States to make compensation under the Fifth Amendment could not be greater than the duty of the State under the Fourteenth (p. 279).[11] This is a far cry from respondent's suggestion that

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terests conflict they are not to be reconciled as between equals, but the private interest must give way to a superior right, or perhaps it would be more accurate to say that as against the Government such private interest is not a right at all.

[11] It is to this point that the second of the two paragraphs from *Powelson*, quoted in respondent's brief at pages 27-28, was addressed. The two quoted paragraphs are widely separated in the text of the Court's opinion (the first appears at page 275 and the second at page 278), and respondent's arrangement of them in immediate sequence creates an entirely mistaken impression which is immediately eradicated when one reads the intervening portions of the opinion.

the identity of the condemnor is immaterial and that the United States, exercising its navigation powers, may be required to pay a riparian owner's claim of water-power value. While the issue presented by the instant case was not touched in *Powelson*, the Court's expressed view that an award based on the condemnee's possession of eminent-domain powers conferred by the State would "be an appropriation of public authority to a wholly private end" (p. 280) carries an implication most damaging to respondent here. For Twin City's claim against the United States does not even rest upon a privilege conferred and in being; it depends upon Twin City's one-time expectancy that it might be granted a privilege (the privilege of appropriating the flow of the Savannah River) which the United States has in fact effectively denied.[15]

As pointed out in our opening brief (pp. 19-29), this Court has repeatedly denied, over the course of the past century, claims by riparian owners for impairment or loss of access to a navigable stream consequent upon the Government's exercise of its paramount powers. In many of these cases, the loss of the privilege of using the stream was substantial in its impact upon the landowner. Thus, in *Gibson* v. *United States*, 166 U.S. 269, 270, the Government's construction of a dike in the Ohio River not only cut off the riparian owner's access

[15] Respondent also seeks support from *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312. As this Court has several times pointed out, the requirement of compensation in that case rested upon doctrines of estoppel. See the Government's opening brief, p. 27, note.

to the stream but had the effect of reducing the value of her land by $150 to $200 an acre. In *Scranton* v. *Wheeler*, 179 U.S. 141, 144, the riparian owner alleged very substantial damages as a result of the Government's construction of a pier permanently obstructing his frontage on the river. The Court has disallowed recovery in such cases because the riparian owner's right is always "subject to the contingency that such right might become valueless" as a result of the Government's exercise of its prerogatives. *Id.*, p. 164. And the Government's "paramount authority" is not to be "crippled" by a rule which would compel it to pay for an exercise of that authority. *Ibid.*

In a short footnote to its brief (p. 36), respondent attempts to distinguish this line of cases on the ground that they involved damage to the riparian owner, whereas the instant case involves a taking of the entire fee. The United States is, of course, prepared to pay the highest value of the fee exclusive of any use predicated upon special adaptability for the development of water power. It stands ready to make compensation for the agricultural or timber value of the lands as specially found by the Commissioners.[16] Respondent's suggestion that the United States, admittedly not required to make compensation when, in the proper exercise of its prerogatives, it precludes a riparian owner from access to a stream, must nevertheless pay a valuation predicated upon use of the waters

[16] This valuation took into account the "value of assembling" the parcels. R. 45-46.

when it takes the riparian owner's fee is a logical absurdity. If the riparian owner's very right of access to the stream is completely subordinate to the Government's paramount authority, how, then, can land value be predicated upon the assumption of a vested right to appropriate the flow of the stream when the Government, exercising its authority, condemns the land?

Respondent would avoid this dilemma by the suggestion that there are many situations in which public improvements cause appreciation in the value of neighboring property. "Property abutting upon a busy street," it is said (Br., p. 30), "derives most of its value from that location." This is perfectly true, but the owner of lands located near a busy street or public highway is entitled only to the value which that property has for uses generally available to the owner and to buyers from him. He may not predicate enhanced value upon an assumed right to control the traffic on the street or to make the highway a private preserve. And if the Government takes away his access to the highway, *e.g.*, by changing the grade of the road, it incurs no liability. This is the law, this Court has observed, "in nearly every state in the Union." *United States* v. *Willow River Co.*, 324 U.S. 499, 510-511.

Respondent also seeks to avoid the conclusion that what it is asking is special value to the taker by pointing out that Savannah River Electric Company has shown periodic interest in the purchase of its property for power purposes (Br., pp. 25-26).

But Savannah Electric's interest was as a prospective water-power licensee of the United States. The obligation of the United States cannot be augmented by indulging in speculation as to what Savannah Electric might have paid for the property in order to improve its chances of acquiring a license or what it might have offered if actually granted one. The fact remains that respondent is seeking a special increment of value predicated upon a use of the waters which falls within the navigation servitude of the United States. The hypothesis that the United States might have delegated the privilege of appropriating the flow to respondent, to Savannah Electric, or to some third party does not lead to the conclusion that the United States, having exercised its prerogatives, must pay for frustrated expectancies.

Respectfully submitted,

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